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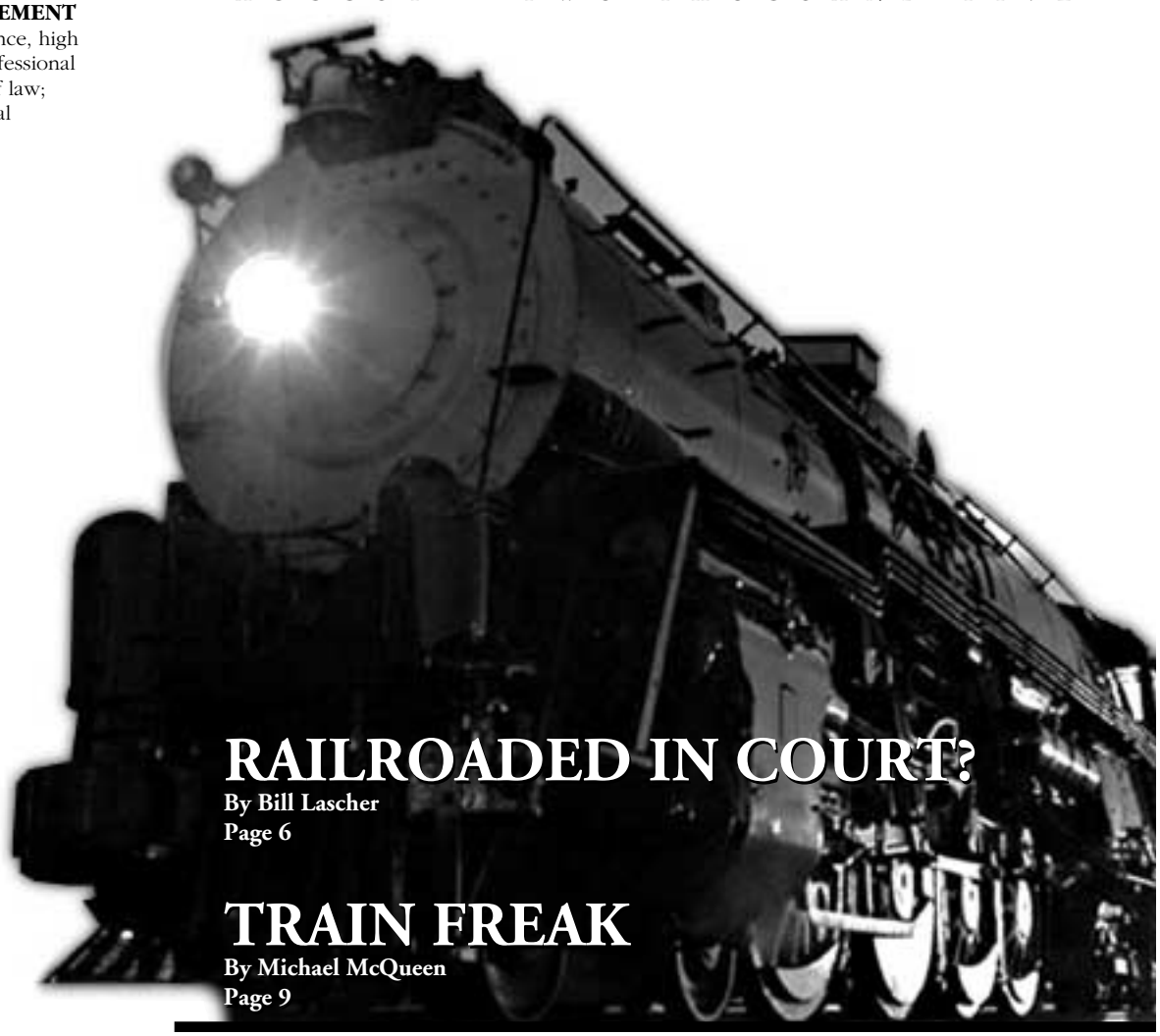

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PRESIDENT'S MESSAGE: ZOOM ZOOM

By Don Hurley (With apologies to Mazda)

Motorcycles are a bit like the girls who hung out near the high school gymnasium, smoking cigarettes, and wearing low-cut blouses. You realized that they were probably bad for you, but perhaps not so bad after all. Motorcycles are like cigarettes: Everyone warns you about them, and the unreasonable dangers and how irresponsible it would be to actually own one. But, like the girls who hung out near the high school gymnasium...

Too many years ago I took a "Windjammer" sailing trip to the British Virgin Islands with a close friend of mine, Frank Sieh, our wives left behind due to the primitive conditions, lack of four-star restaurants and the need for a periodic "guy trip." While, for this same period of time, I have emphasized the rough seas, humidity, cold breakfasts, and general misery to our respective wives, it was really a great time. We visited beaches untouched by the cruise ships, found small cafes on the beach, and plodded along mud pathways to pristine swimming holes.

Our third port of the trip was St. Bart's, home of the rich and famous, with whom I had always wanted to be associated. It was August and the 95 degree temperature was matched by the humidity. Frank appeared each morning with freshly pressed Bermuda shorts and short-sleeve shirt, yet we both arrived onboard with only one small suitcase apiece. It was like watching some of the characters on "Gilligan's Island," possessing an unlimited wardrobe, while I made do with a cheap t-shirt from the last port-of-call.

Striking off on our own, we decided that the best means of transportation was not the more accepted jeep but motorscooters, Honda 250cc scooters, to be exact. This was my first encounter with a motorized two-wheeled vehicle, but powered by the Caribbean sun and my usual overconfidence, I put the deposit down, placed the helmet on my head and proceeded down the roadways of the island, women and small children fleeing at my approach.

Frank and I toured most of the island, stopping to enjoy the panoramas of an environment blessed with abundant rainfall and rich soils and an equal mix of wealthy foreigners and impressed tourists. We wandered down the winding roads, interrupted from time to time for a reverent pause at a topless beach or a multi-million dollar vacation residence. I was beginning to feel like Peter Fonda in "Easy Rider," minimized only slightly by the Honda scooter rather than the Harley Hog.

I returned from the Windjammer trip refreshed, revitalized and determined to master a real motorcycle. Numerous visits to the local cycle shop followed. I became a resident pest, asking questions about each and every model, and obviously understanding very little of the responses. Rather than tempt the angel of death more than was absolutely necessary, I enrolled in a motorcycle safety course accompanied by a class of 20 or so similarly dedicated individuals collectively taught by an off-duty Navy Petty Officer.

Class was a bit like a reality television show: We started with a set number, knowing that many of us would not make it through to the end. The first casualty was a very senior citizen who did not understand the lean-into-the-corner-to-steer-the-bike concept, the result of which was watching her proceed straight through a hedge separating the training area from the roadway. Others in the class would become frustrated at their lack of progress or read too many stories about motorcycle fatalities and failed to complete the course. My approach was to purchase an appropriate 600 cc standard motorcycle and train diligently every weekend. However, women and small children were still advised to stand clear of my path.

After graduation, short weekend trips followed, and I discovered the excitement of riding up and down the Dennison Grade in Ojai, learning to look ahead of the corners, braking prior to beginning the turn and always being totally alert to my roadway environment. Survival on the road also meant wearing gloves, boots, heavy pants, leather jacket, and an approved helmet. But even with all of the protective clothing and the cautious approach, I discovered the pure joy of motorcycling, of being at one with the vehicle and the road. While in a conventional car, an approaching rock, small animal or patch of sand or ice, had little importance, these observations and the necessary prompt reactions, meant concentrating on nothing else other than the immediate road ahead. It was and remains true and pure escapism.

The fraternity of the motorcycle world became more and more obvious during the following years. People riding a "standard" would wave (an underhand motion of the left hand) at sport bikes, dirt bikes, touring bikes (Honda Goldwings, BMWs, etc) and motorscooters, but Harley riders would only wave back to other Harley riders. This name brand snobbery seemed somewhat out-of-place when the reality was that even I, on a standard 65 horsepower "rice-rocket," could easily outperform almost any Harley rider in acceleration, braking and even top speed. But Harleys are special in that they are American bikes, built on a bed of tradition, with a unique sound and vibration unmistakable to other motorcyclists. While I don't aspire to own such a bike I understand and have a certain admiration for those who tend the flame.

Two more motorcycles followed the first, with the last being a true sport bike, capable of 130 mph right off the showroom floor and 0-60 times that would embarrass most Ferraris. But it still wasn't me. I tinkered with the first bikes to make them faster and more responsive but the result was a machine capable of far more than I on the road. I remain enamored with motorcycles, with the speed and the sound and the knowledge that I can outperform almost any car. But I won't bring another into my garage, because I know that my Miata is a jealous mistress and she will guide me safely past any roads that lie in my path, even as my own reactions may slow a bit with age.

Don Hurley *is an Assistant County Counsel for the County of Ventura and is President of the VCBA.*

LETTERS TO THE EDITOR

CITATIONS welcomes letters to the editor, provided they are signed by an individual.

Editor:

In the early 1990's, then-Governor Pete Wilson deregulated the workers' compensation insurance industry, which resulted in insurance carriers underwriting policies at cut-rate premiums. When the claims started coming in on these policies there was not enough money to pay on them. The insurance carriers took the money and then filed bankruptcy (e.g., Reliance Insurance, Kemper Insurance). When this happens, the California Insurance Guarantee Association (CIGA) takes over the claims.

CIGA was running out of money to pay the claims. This sounded the alarm for reform. Rather than requiring sound underwriting or assuring that premiums would be reduced, the "reform" that was passed in SB899 took away the ability of an injured worker to obtain treatment from a doctor of her choice, limited physical therapy to a total of 24 visits, regardless of the nature of the injury, required utilization review for every aspect of treatment, delayed necessary spinal surgeries with a requirement that a second medical opinion be obtained (often from a doctor who does not even do spinal surgeries), and severely reduced permanent disability benefits.

The true purpose of workers' compensation was not originally to help only workers who had catastrophic injuries. It was a system devised to eliminate civil suits against employers by employees hurt at work.

Doctors treating workers' compensation patients have always been paid according to a set fee schedule approved by the state. Lawyers fees are capped at 15% on any permanent disability award.

With the new workers' compensation laws, we are litigating more than ever, fighting at every turn mostly to obtain medical treatment that is being denied. We do not get paid for this. We only get paid when the case is resolved. Our clients are suffering more than ever and injuries that should have been treated promptly are now evolving into more serious injuries due to the delay in treatment.

As an employer myself, I can relate to the upset over the lack of responsible response from the insurance industry in reducing premiums. But, then, how silly of me to think they would reduce premiums voluntarily! The governor specifically deleted any terms in the new workers' compensation law that required premium reductions. So business and injured workers are both suffering at the hands of the greedy insurance industry.

Deirdre Frank *handles personal injury and workers' compensation cases in Ventura. This letter to the editor first appeared in the Ventura County Star on June 17.*

Editor:

"Nor shall private property be taken for public use without just compensation ..."
Fifth Amendment to the
United States Constitution

"When I use a word," Humpty Dumpy said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."
Alice's Adventures in Wonderland
Louis Carroll

The recent Supreme Court decision regarding the law of eminent domain in *Kelo v. City of New London* brings these quotes to mind.

For many years the Bill of Rights, the first ten amendments to the United States Constitution, acted as a restriction and limitation on the powers of the government against its citizens. The Founding Fathers were quite concerned that the long arm of the federal government not be unchecked. Though many people know that someone "Takes the Fifth" to avoid having to testify against themselves, for those who study real property law the Takings Clause quoted above is equally significant.

The Founding Fathers realized that for a nation to grow, it had to have infrastructure. It needed streets. It needed post offices. It needed schools. It needed parks. It needed facilities to be used by the citizens in common if the nation had any chance of surviving and growing. For over 200 years, we understood the concept that government could exercise its right to reach out and take someone's private property only so long as it was for public use.

The common understanding of the words "public use" could be clearly stated by perhaps 99 out of 100 people. It meant that whatever was acquired was to be used in common by the general public. No one has any qualms about that type of use. But now the Supreme Court, in a 5 to 4 decision, has expanded the meaning to any "public benefit."

As Humpty Dumpy indicated, words mean exactly what I say they mean. The Supreme Court among all Courts in the United States has the distinct ability to precisely say what the words of the Constitution mean. And we, the people, are not to be restrained or controlled by meanings other than what the solemn wisdom of the Court says they mean.

In my experience, it would be an unimaginably weak local government such as City Council or other quasi-legislative agency like Redevelopment Agencies, Housing Authorities, etc., that cannot find a public benefit in any activity which would generate greater revenue for the public treasury than current property taxes generate.

Until this decision, the courts have upheld the concepts of redevelopment. The test, however, for redevelopment was that an area had to be "blighted," a somewhat subjective standard which, however, could be tested in court by objective standards.

The new public benefit rule, however, sets such a low standard for the use of eminent domain as to virtually eliminate any restriction or restraint against overreaching, which the Fifth Amendment granted to the citizens. The concept that government can now be utilized to acquire Property A to give to another private citizen so that the government can collect higher taxes is a terribly slippery slope!

While there have been very few abuses in Ventura County, it cannot be long before some economic advisor to some city someplace will demonstrate that if we only eliminated these older residential properties, we could put in a new parking lot for a new big box store which will, of course, generate terrific property tax for the benefit of the local government.

Justice Sandra Day O'Connor's dissent in *Kelo* ably points out that the majority decision

empowers the powerful and well-connected over the interests of the ordinary citizen.

California eminent domain law attempts to ensure that a person subjected to an involuntary conversion (government talk for taking your property) receive an independent appraisal and assistance in relocation. But what is not included in the concept of "just compensation" for the taking of property is the anxiety, the loss of security, the loss of familiarity of having a property you have lived in for a long period of time stripped from you. Further, the upheaval in relocating and trying to once again establish either a life or a business at a new location is never compensated.

I have always contended that there is an "X" factor which is not compensated for – the little bit of liberty that is lost each time private property is taken for public use, err, make that public benefit.

To quote another famous expression, "It's good to be the king."

Lindsay Nielson *is a lawyer and real estate appraiser in Ventura.*

RAILROADED IN COURT?

By Bill Lascher

At the close of the nineteen-fifties Superior Court Judge Steven Hintz left a Lionel train set behind after he and his family moved from their Alaskan army quarters, but his father was able to squeeze his HO scale equipment into the family's moving boxes. Nearly a half-century later, Judge Hintz still has his dad's HO equipment, and he still has the passion for trains that left the station when he and his father were flipping switches together in their basement.

In addition to his judicial duties, Hintz enjoys his duties as the chief financial officer for the California State Railroad Museum Foundation. A board member since 1999, Hintz relishes being a part of what he considers the country's best railroad museum. Located in Old Sacramento, the museum is a unit of the California State Parks and Recreation Department. Hintz oversees the management of the foundation's $2.8 million budget, which is dispersed to the museum and for the administration of various projects outside the reach of Parks and Recreation, such as taking instant action to purchase a vintage railcar. It even supports a railfan's fantasy in the form of Railtown, located in the Tuolumne County town of Jamestown.

"Stuff like that never comes out," Hintz said. "Not from clothes and not from memory."

"Railtown is like going back in time to 1925 to visit a complete steam railroad terminal and shop area," Hintz said. "It's just as if a railroad company had thrown down its tools and walked away."

Unlike Mike McQueen (see TRAINFREAK, p.9), Hintz has primarily focused on model trains, but he has a taste for the big ones, too. He's been to all the railroading "hot spots," and has often visited one of the country's most dramatic sections of track, the Tehachapi Loop, a giant circle of a railway near the mountain town that serves as the link between the Mojave Desert and Bakersfield. He's seen the steep grades of the Donner Pass, which still challenges trains in the winter. In 1999 Hintz and his son even saw one of McQueen's trains pass through the Cajon Pass on its way to Railfair, an internationally recognized event held every ten years and sponsored by Hintz's railroad museum foundation. At Railfair, railfans can see everything from operating replicas of early locomotives to modern designs from abroad, even locomotive drag races. Hintz still has the shirt he wore when a boiler malfunction on the Union Pacific Challenger showered observers with oil soot.

"Stuff like that never comes out," Hintz said. "Not from clothes and not from memory."

Trains remain a father and son activity for Hintz, who poked around the Sacramento railyards before doing so would have raised eyebrows. In addition to his own adventures since the 1980's, spotting trains at places like Tehachapi, Donner and Cajon, Hintz has shared the experience with both his father and his son.

"I managed to get my father out there twice before he died," Hintz said. "I got my Dad to Cajon; I got my son to trainyards in Bakersfield and Sacramento, and to Cajon; and we had one trip, all three of us, to Tehachapi."

Perhaps some day Hintz will let you see the HO collection he started in high school, but not any time soon. "As all model railroaders do, I have plans for a larger, better layout just as soon as time permits." Hintz said. "Until then, I am really pretty much what they call an armchair model railroader."

Although Judge Hintz doesn't see a connection between his duties on the bench and his involvement with the California State Railroad Foundation, his words suggest a link between the two: "What a great combination – public service and trains."

Locally, train buffs can attend one of the events on the diesel-powered Fillmore and Western railway or see some of the locomotives at Travel Town in Griffith Park (or ride the miniature trains next door). For those of you who want to join Hintz on the armchair railroading circuit, find out about the Santa Susana Railroad Historical Society and Model Railroad Club or visit the model railroad exhibit at the Ventura County Fair.

For the apparently few nonrailfreak members of the local legal community, HO scale trains are the smaller, more realistic cousins of the more toy-like Lionel and other O gauge trains. Originally developed in the U.K, HO took off in the U.S. because of the attraction its smaller scale offered to hobbyists who only had so much space for their grand armchair railroading. This means more track, more train cars, and more little trees and yes, more little Appalachian villages.

Bill Lascher *is a writer, editor, and researcher based in Ventura, bill.lascher@world.oberlin.edu.*

TRAIN FREAK

By Michael McQueen

There must be something in human nature that promotes obsession. Whether it is collecting thimbles, electric insulators, or travel spoons, there appears to be no end to the fascinations humans can develop over material or even transsubstantial objects. For some people, trains represent an abiding passion.

My own interest in trains evolved gradually. I had the typical Lionel train set as a child but nothing very extravagant. When I tried to build a large garage layout with my model train, my focus would soon wane. It was hanging out at Travel Town in Griffith Park that sowed the seeds of obsession. Trains were just huge to a child. They were loud and fast. One cheap thrill was to hang out in the Chatsworth tunnel while a train ran through. Talk about panic attack.

As a wild youth I once snuck into the train yard in Bakersfield, climbed into a running diesel locomotive, sat in the engineer's chair and contemplated the throttle and the open tracks in front of me. That was one joy ride I am glad I did not take (the consequences to my legal career are unsettling to consider). But you should have been in the cab. The roar and thrum of power where intoxicating.

In my teens I had traveled on the Super Chief, with the famous dome cars, from Union Station through Albuquerque, and on to Chicago. The rhythmic sway and the quick clack of the wheels on the rail joints, as well as that unique institutionalized smell trains have, have stuck with me for forty years.

These interests lie imbedded in you, like a dormant virus waiting for some irritant or opportunity to become virulent. In my case, I was working at Unocal as an attorney when I was approached and asked to help a group called the San Bernardino Historical Railway Society negotiate the purchase of a 1928, 4-8-4 Baldwin Steam locomotive (known as "the 3751") that had been sitting in Viaduct Park for 50 years. Since I was dealing a lot with the land holdings of the Union Pacific and Santa Fe railroads, I agreed.

I negotiated the purchase of the steam locomotive for three dollars, and convinced the powers that be at the railroads to lay track through the street into the park and drag the locomotive out of the park. Then I negotiated the donation of a hanger at a steel foundry in Fontana. Volunteers restored the locomotive to operating condition. Several times a year, it goes out on "high steel" and everybody gets excited and flocks to the grades to take pictures of the mighty 3751 chugging through. It is neat knowing that my efforts resulted in bringing back the equivalent of a prehistoric animal to walk the earth again. A mechanical Jurassic Park. It is satisfying. It's actually quite bitchin'.

With my pro-bono railroad laurels in hand, I was approached by the Carrolwood Society to assist in a stalemated negotiation with Disney. Carrolwood is the name Walt Disney gave his backyard steam locomotive models, the kind you can actually sit on and pull trains that people ride. (There are steamer clubs – fascinating miniature railway companies – throughout the country, including one in Moorpark, one in Griffith Park and one that I visited in Alaska.) Carrolwood had been negotiating with Disney for years trying to rescue five abandoned steam locomotives that were used in the Fort Wilderness Resort. After 14 months of intense negotiations and drafting, Disney finally relented and gave the locomotives to the society for individual members to restore. As a result I was awarded the annual Norrel Train Preservation Award. That little plaque cost me about $15,000.

Perhaps it's a genetic proclivity, but males make up a predominant percentage of railroad enthusiasts, be it small train models, miniatures, backyard garden train sets, scale steam locomotives, Disney-sized narrow gauge, or even large full locomotives and railway cars. Because of my interest in railroads and contact with various railroad enthusiasts, I have had the experience of taking a trip from Union Station to Sparks, Nevada in "private varnish" – the name for private railcars that prominent business tycoons would attach to different trains. It was quite a trip, with two 1940 Pullmans and a 1920's private railcar with a private dining room and parlor that looked like a bordello. You walk out on the back patio and watch the fanatic train spotters chasing you along the road taking pictures. Train enthusiasts spot a unique locomotive or an antique railcar, grab their cameras, and chase you for as long as they can, taking pictures and enjoying the thrill of watching a bit of living history.

Michael McQueen *is a lawyer in Camarillo, and a member of the CITATIONS editorial board.*

EMINENT DOMAIN, REDEVELOPMENT, PUBLIC USE AND THE *KELO* CASE: COULD *KELO* HAPPEN HERE?

By Mark E. Hancock

EMINENT DOMAIN: AN INTRODUCTION

The power of eminent domain is the right of the state to appropriate private property for public use. It harkens back to feudal times, when a king had superior dominion over all of the lands within his realm.

At least since the Magna Carta, there have been (at least in some jurisdictions) restrictions on this element of sovereignty. Chapter 28 of the Magna Carta, for example, says, " No constable or other bailiff of ours shall take another's grain or other chattels, without immediately paying for them in money..."

Some courts have questioned the continued existence, in the time of republics, of concepts that date from the age of the divine right of kings. But whether you subscribe to the notion that we have substituted the monarchy of the many for the solo sovereign, the fact is that the sovereign power of eminent domain survives, unchallenged – though limited – in both our federal and state constitutions. (See U.S. Const., 5th Amend. and Cal. Const., art. I, § 19)

In terms of limitations, both the U.S. and California Constitutions provide that private property shall only be taken under eminent domain for *public use* and for *just compensation.*

In California, there is a body of statutory law dealing with eminent domain actions. (See Code Civ. Proc., §1230.010, et. seq.) Sections 1240.010 and 1240.030(a) codify the requirement that the power is to be exercised only for public use. Section 1240.030(a) also introduces the concept and requirement, in California, of "necessity."

A BRIEF DIGRESSION ON "NECESSITY"

By statute, owners may contest the right to take (including the necessity of the taking) in the first place. (See, for example, Code Civ. Proc., §§1255.430 and 1260.110), focusing, with regard to necessity, on three elements. First, that the public interest and necessity require the project. (Code Civ. Proc., §1240.030(a)). Second, the project must be planned or located in a manner most compatible with the greatest public good and the least private injury. (Code Civ. Proc., §1240.030(b)). Third, the property sought must be necessary for the project. (Code Civ. Proc., §1240.030(c)).

One way that "necessity" and "public use" are distinguishable is that "necessity" focuses on the need to take ***a specific parcel***. Individual parcel owners and their lawyers may want to consider, evaluate and make a record concerning the "necessity" of the taking of their parcels in any challenge of the exercise of eminent domain.

It may be more difficult to challenge "necessity" if one dawdles. The reason is that, while "public use" is always justiciable, despite legislative declarations of public use, a resolution of necessity (which is a required precursor to an eminent domain action, see Code Civ. Proc., §§1240.040 and 1245.220) conclusively establishes the matters referred to in section 1245.030. (Though there have been successful challenges based on the lack of substantial evidence supporting the resolution in the record, etc.). This means that the parcel owner and his or her lawyer will want to evaluate making a record and challenging "necessity" prior to the vote on the resolution. The law requires some notice and an opportunity to be heard for owners of parcels sought to be acquired before a resolution of necessity is voted upon. (Code Civ. Proc., § 1245.235)

REDEVELOPMENT

Traditionally, the power of eminent domain was exercised for limited public purposes such as the construction and maintenance of streets, highways and parks. (*City of Oakland* v. *Oakland Raiders* (1982) 32 Cal.3d 60, 72). However, the definition of "public use" appears to have expanded. In the *City of Oakland* case, for example, a city's attempt to acquire a professional football franchise was held to be a "public use" – though Oakland's eminent domain effort was later sacked on the basis that it would impermissibly meddle with and burden interstate commerce and the national economy.

The expansion of the definition of "public use" to encompass acquiring property for purposes beyond streets, highways and parks has created no little controversy. Modernly, eminent domain has been used for such things as "economic development" and "redevelopment." Since the 60's, the power of eminent domain has specifically been available in California for "redevelopment" of physically and economically blighted areas under Health and Safety Code section 33000, et. seq., ***provided that the ordinance adopting the redevelopment plan contains that power***. The U.S. Supreme Court upheld the use of eminent domain for the purposes of redevelopment in *Berman* v. *Parker* (1954) 348 U.S. 26.

Redevelopment in California includes "the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation...of all or part of a survey area, and the provision of...residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general welfare..." (H&S Code, §33020(a)). It has been stated that the foundational basis for a finding of public use under redevelopment law is the elimination of blight and urban decay. (1 Condemnation Practice in California (Cont.Ed.Bar 2d ed. 2004) § 6.4, p. 261).

Legal disputes arise because of the nature ("public use") of the "redevelopment" or "economic development" causing the displacement. Additionally, because of the reality that redevelopment agencies often carry out the "redevelopment" through private developers who provide necessary funding, there are issues relating to "done deals." (See, for example, *Redevelopment Agency* v. *Norm's Slausson* (1985) 173 Cal.App.3d 1121). There are also issues of whether private property can and should be taken, through eminent domain, for the purpose of giving it to other private persons, as well as issues about whether property is blighted. (see, for example Sweetwater Valley Civic Assn. v. National City (1976) 18 cal.3d 270.)

Kelo v. *City of New London, Connecticut* (2005) 2005 WL 1469529 took the matter a step further and involved the use of eminent domain for "economic development," eliminating the requirement of blight and highlighting the controversy over using eminent domain to take property from one private citizen to give it to another.

THE *KELO* CASE AND THE MEANING OF "PUBLIC USE"

In 2000, the City of New London, Connecticut approved a development plan projected to create in excess of 1,000 jobs, to increase tax revenue and to revitalize an economically distressed downtown/waterfront area. The area had lost 1,500 jobs because the Federal Government had closed the Naval Undersea Warfare Center in 1996. In 1998, the City had an unemployment rate nearly double that of the state and its population had shrunk to 1920 levels.

Pfizer, Inc. announced it would create a multi-million dollar research facility in the vicinity and a private, non-profit development corporation was reactivated to capitalize on the arrival of Pfizer and to help plan for the revitalization of the area. The development corporation came up with a plan focused on 90 acres of riverside property, encompassing 115 privately owned

properties. It included a waterfront conference hotel, restaurants, shopping, a pedestrian river walk, marinas, 80 new residences, a new Coast Guard museum, office space, and parking. In addition to creating jobs and increasing tax revenue, the plan was intended to make the City more attractive and to create leisure and recreational opportunities.

The City authorized the use of eminent domain to implement the plan. Susette Kelo and eight other owners in the area, some who had lived there all their lives, contested the plan as violating the "public use" restriction of the Fifth Amendment. There was no allegation or evidence that any of their properties were blighted; they were condemned only because they were in the development area.

The Supreme Court's decision began by saying the sovereign may not take the property of one party for ***the sole purpose*** of giving it to another private party even with compensation. If the actual purpose is to bestow a private benefit, the taking is an invalid use of eminent domain power. But having said that, the Court went on to state that transferring condemned property to private persons and entities doesn't necessarily violate the "public use" requirement.

First, the Court stated that there was no evidence of illegitimate purpose behind the New London plan or that it was adopted solely to benefit private individuals or entities. Though private parties would come to lease the office space and buy the homes, the Court noted that they were not ***identifiable*** when the plan was adopted.

Second, though a good deal of the condemned land would not be open for use by the general public, the Court said it had long ago rejected any literal requirement that condemned property had to be put into use for the general public. (It doesn't have to be a park.) Rather, the modern interpretation and requirement is "public purpose." The majority cited to examples from the days when miners, manufacturers and mill owners were allowed to do such things under color of law as flood upstream properties (in exchange for compensation) in order to generate hydroelectric power. The takings were "justified" in light of the benefits created for the public as a whole, i.e., there was "public purpose" even though the property went to private enterprise. The *Kelo* majority, evoking federalism, stated that great respect is owed to state legislatures and state courts in discerning local public needs. State legislatures can also choose to limit eminent domain.

Also, the majority noted that, while New London was not confronted with the need to remove blight, there was sufficient distress to justify a program of economic rejuvenation. The opinion stated that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose."

The fact that private individuals would benefit was of no moment. Justice Stevens wrote: "[T]he government's pursuit of a public purpose will often benefit individual private parties." The court left for another day the objection raised by the owners that nothing would then restrain a city from transferring property from one citizen to another for the sole reason that the transferee could put the property to more productive use and pay more taxes. Comedian Jay Leno joked: "It just goes to prove that one man's home is another man's Wal-Mart."

COULD *KELO* HAPPEN HERE?

Some commentators have opined that, notwithstanding *Kelo*, the same thing could not happen in California – or that, at least, it would be more difficult. But that is open for debate.

One reason for a difference in result might be that Connecticut had a state statute specifically authorizing the use of eminent domain for the purpose of "economic development." In California, however, the goal of commercial and industrial development in a depressed (as opposed to blighted) community does not justify the use of the extraordinary powers of community "redevelopment" (*Regus* v. *City of Baldwin Park* (1977) 70 Cal.App.3d 968).

But, on the other hand, *Berman v. Barker, supra,* 348 U.S. 26 and *Regus, supra,* both hold that not all the property in a redevelopment area needs to be blighted. If a redevelopment area in California, viewed as a whole, is blighted, neither *Regus, Berman,* nor *Kelo* will necessarily save the dissenting owner of a non-blighted property, though that owner might try to argue the "necessity" of the inclusion of his or her property in the project (*see,* H&S Code, §33321 and Code Civ. Proc., § 1240.030). People might also be surprised to learn that non-contiguous, unblighted ***vacant*** property can be considered necessary and condemned for the purposes of relocation of people from a blighted area or for the construction and rehabilitation of low or moderate income housing. (H&S Code, §33320.2).0

Moreover, someone might raise the argument that "redevelopment" is not simply defined as, or limited by statutory definition to, the eradication of blight. The statutory definition is arguably broader, encompassing considerations of "the general welfare."

Further, the power of eminent domain is itself broader than "redevelopment." Redevelopment is only one justification for the use of eminent domain. After all, the California Supreme Court held that it would be a permissible "public use" to take the Oakland Raiders by eminent domain. "Blight" and "redevelopment" had nothing to do with it. In *Kelo*, the court upheld the constitutionality (i.e., the "public use" nature, at least based on the federal constitution) of takings for the purposes of economic development.

The fork of eminent domain, presently, has more than one tine.

Mark E. Hancock *is a Ventura lawyer who handles insurance, personal injury, business, and municipal law-related matters.*

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EAR TO THE WALL

Santa Paula attorney **Phil Romney** passed away in early July. He was remembered by **Retired Presiding Justice Steve Stone** for his admirable devotion to family and community. "Phil worked incessantly for years to accomplish what he believed was best for Santa Paula."

As of January, new prosecutors **Andrea Tischler**, **Catherine Voelker**, and **John Barrick** joined the **District Attorney's office**. They are prosecuting misdemeanor cases. **Gary Evans**, a veteran prosecutor from the San Luis Obispo District Attorney's Office has moved to the Ventura District Attorney's Office, assigned to felony prosecutions. The office now employs about 85 attorneys.

Tina Schoneman joined the law firm of **Bohl & Wohlgemuth**, focusing on construction defect litigation. Her new telephone number is (805) 654-1980.

The **Ventura County Department of Child Support Services** hired attorney **Tim Hirschberg**. The DCSS establishes and enforces child support obligations.

Procter, McCarthy & Slaughter, LLP. grew by three attorneys last month: **Kathryn E. Pietrolungo**, **Donna M. Yannotta** and **Eric S. Bernhardt** will practice insurance defense and may be reached at (805) 658-7800.

Kristi Anderson recently joined **The Law Offices of Scott Green** as an associate attorney. The firm focuses on construction and business matters. While continuing to work on litigation matters, Kristi will also be working on transactional matters including drafting construction contracts and structuring business entities. Kristi can now be reached at 33 E. High Street, Moorpark, CA 93021, (805) 517-1899 ext. 18.

Melissa E. Cohen and **Thomas J. Milhaupt**, of **Milhaupt and Cohen**, announce their relocation to 816 Camarillo Springs Road, Suite F, Camarillo, CA 93012. Their new telephone number is (805) 482-0220, and fax number is (805) 482-0116.

Myers, Widders, Gibson, Jones & Schneider, LLP is pleased to announce that **Theodore J. Schneider** and **Michael S. Martin** have become associates of the firm. The firm continues to emphasize municipal and governmental entity law, homeowner association law, construction defect claims, business and corporate law, insurance coverage and claims, estate planning, elder law and tax law.

Attorney **Erik Feingold** of **Myers, Widders, Gibson, Jones & Schneider, LLP** and wife Shauna welcomed Sloane Alexis Feingold into the world on June 30. She was born at 1:01 p.m., weighed 9 pounds, 1 ounce and measured 21.5 inches. Mommy is exhausted, Sloane is sleepy, Daddy is stoked and older sister Stella's not sure yet...

CATCHING UP WITH... BOB DAVIDSON

By Michael Velthoen

When Bob Davidson retired from Benton, Orr, Duval & Buckingham in December 2003, he had a pretty clear idea of how he wanted to spend his time. Long interested in theater, Bob decided to pursue a second career as a voiceover artist in Hollywood. **6O! O6B @M*recently caught up with Bob over lunch.

How are things going?
Great! I am having the time of my life. Yesterday, I went down to Los Angeles and was an extra in a movie starring Mandy Moore and Hugh Grant. Whatever comes up, I jump at it. Although I started by focusing on voiceover work, I am now doing on-camera work as well.

What projects have you recently worked on?
About a month ago finished a short film called "Mute." I played the father of two sisters, one of whom becomes mute in an accident caused by the other. It was directed by Melissa Joan Hart, who starred in the television series "Sabrina the Teenage Witch." She has a production company and put the film together to showcase her directing skills. Plans are for it to premier at Sundance Film Festival in the fall and then hopefully go on to Cannes and other festivals in the hope of finding financing to turn it into a feature. Garry Marshall, the well known actor, producer, director has a cameo role. Working on it was a ball and I learned a great deal from a very professional crew of Hollywood veterans.

How do your current activities compare to being a lawyer?
In film making there is a lot of "hurry up and wait" – just like going to trial. For example, when I appear as an extra I spend a lot of time in the holding area exchanging ideas with a wide variety of interesting people. I also get paid to catch up on my reading and iPodding. It's a great opportunity to learn about "the biz." But best of all, at the end of the day I go home without any lingering responsibility. That's a lot different from being a lawyer.

How did you get started in all of this?
Right after I retired I played Lieutenant Schrank in the Ventura College production of "West Side Story" with you. I then acted in some student films and took some acting classes at VC. I have also taken a series of voiceover classes in Hollywood to prepare me to make a VO demo disc which I can use to shop for a VO agent. I've also taken an on-camera commercial class and have an on-camera commercial agent who has sent me out on about 15 auditions for TV commercials. They're a lot of fun and, who knows, maybe I'll book one soon.

What else are you doing?
I remain involved with Volunteers In Parole, which is now known as VIP Mentors. It's a program co-sponsored by the State Bar and the California Youth Authority that matches lawyers to act as friends and mentors to young people in the criminal justice system. I've been in it since 1996. Currently I'm with a terrific young man who has really turned his life around. Boy, talk about a satisfying experience! I encourage all lawyers who might be interested in the program to visit www.vipmentors.org or call me at (805) 340-4706. VIP was featured in a front page article in the July edition of the State Bar Journal.

Mike Velthoen *is a Ventura lawyer and a member of the CITATIONS editorial board.*

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PRO-BONO CORNER

By Verna R. Kagan
VLSP Senior Emeritus Attorney

The pro-bono attorney of the month (or rather ongoing) has to be **Brian Nomi**. Brian has taken on a large proportion of our landlord/tenant matters. That, in itself, would be truly remarkable and worthy of many thank yous. However, there is more. Brian always makes himself available to answer Emeritus Attorney questions. Further, on more than one occasion, he has received a referral so late that he barely has time to accomplish the task before him. Last but not least, he has been confronted with unusual fact patterns and even more unusual personalities. When an Emeritus Attorney seems to blush about such referrals, Brian will turn around and in his reassuring voice announce that he is looking forward to handling the matter. This flurry of activity occurred during the time his wife was expecting and then delivered their second baby. Brian, we would be lost without you.

BOOK REVIEW

By Al Menaster

Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse
By Steve Bogira. Knopf Publishing, 2005, $25.00, 416 pages.

This is less a book review and more about the fact that my view of the criminal justice system was altered as a result of reading this book. Steve Bogira spent 1998 in Courtroom 302 in Chicago, watching every case handled for that year. He spoke to the defendants, the lawyers, the judge, the families, everybody. It is amazing to me that someone who is not a lawyer (Bogira is a journalist) and who is not a part of the system could understand so well exactly what is going on.

We are all in the system, but I fear we too rarely step back and really think about what's going on. Bogira's theme is that the criminal justice system is not about justice at all; it's just an industry. If you think about that, it's obviously true. The judges are just trying to push through the cases, the prosecutors just want to win every case, and the police are trying to close cases and get convictions. Who is trying to do justice?

And this industry provides quite a nice living for the people who staff it. The judges earn a good salary, as do prosecutors and, frankly, many defense lawyers, private and public. Let's think about all the other people making a living, and a career, out of the criminal justice system: bailiffs, court reporters, interpreters, probation officers, police officers, the folks building the buildings all these people work in, the folks maintaining the buildings all these people work in. The list goes on and on. The criminal justice system is a multi-billion dollar industry, and it is supporting a huge number of people.

Another Bogira point: the system's fodder is almost exclusively poor people. Sure, some middle class folks appear on drunk driving cases or as the Johns in prostitution stings, but take a look at your courtrooms; the overwhelming majority of defendants are poor. Is that because the poor are committing more crimes? I think not. Reflect for a moment on how much cocaine is being used in Beverly Hills this weekend. Now think about how much cocaine is being used in Watts. Do you really think there is more cocaine being used in Watts than in Beverly Hills? Yet next week I'd be surprised if more than a handful of cocaine cases will come through from Beverly Hills, while dozens and perhaps hundreds of cocaine cases will come from Watts.

Bogira got me thinking about what we're really doing here. Does anyone really think that sending a person to prison or jail helps that person in any way? I doubt that even the judges, prosecutors, or police would make such a claim. No study supports the belief that jail or prison causes people to stop committing crimes; the recidivist rate alone is dispositive proof to the contrary. And don't give me that canard that at least we've taken them off the streets so they can't commit more crimes. The studies show that most crime is situational–the car left with the keys inside–so even if this defendant doesn't commit the crime, the next guy will. No study shows that anything the criminal justice system does has the slightest impact on crime rates.

Probation? Is anyone on probation actually getting help or getting better because of probation? Let's be honest here. Almost nothing anyone is doing in the criminal justice system is actually changing anyone's life for the better.

Perhaps drug court changes some lives. But Bogira studied drug court. In Chicago, there was a great increase in drug cases after drug courts were created. Bogira thinks that the police often used to just flush small amounts of drugs and let the defendants off with a warning. Now they file every case, figuring at least the defendants will get help. This, of course, causes drug courts to be too overwhelmed to be as effective as they might be. Although I support drug courts (especially in light of the alternative), no study shows that drug courts are effective either.

Reading Bogira's discussion of suppression motions made me think about police perjury. We know that the police routinely perjure themselves when testifying in motions to suppress evidence and confessions. Yet how

often do we win suppression motions, not based on some defect in the police version, but because the judge rules that the police officer lied? I have never won such a motion, and even if you have, have you won more than five? Ten? So what percentage of police perjury is being called for what it is? One one-hundredth of one percent? Yet you almost never hear about this topic, and judges simply won't find that the police are committing perjury, even though they know perfectly well that perjury is routine. Take the Rampart scandal. We now know for a fact that the police lied about hundreds of cases. How many of those cases, when they were going through the system, were dismissed by judges who found that the police were lying? Exactly none. What better proof could there be that the justice system is simply not about justice and has little or no chance of actually achieving anything resembling a just result in any case?

Bogira's book is well written. He tells the stories of the many cases going through this one courtroom, cases typical of cases all of us are handling. This is an important book for all of us to read and reflect on. Here's my final insight. I humbly submit that there is only one person in the courtroom actually trying to make justice happen. You know that's not the judge, the prosecutor, the police officer, the victim, the court reporter, the bailiff, or the interpreter. If you are not trying to make justice happen, no one is. Our challenge is to be the only voice for justice in an industry gone mad, an industry trying to push through cases at top speed and secure high conviction and incarceration rates, and which can't be bothered with trivial stuff like actual justice. We must fill that role, because no one else will.

Al Menaster *is head deputy, appellate branch of the Los Angeles County Public Defender's Office. This review previously appeared in CACJ Flash.*

WE READ SO YOU DON'T HAVE TO

By Joel Villaseñor

AN OBITUARY FROM JUNE 22's *DAILY TELEGRAPH*:

Patrick Pakenham, who has died aged 68, was a talented barrister and the second son of the 7th Earl and Countess of Longford; highly intelligent, articulate and possessed of an attractive and powerful voice, Pakenham could have attained great professional heights, but his boisterous nature and bouts of mental illness rendered it impossible for him to adhere to the routine required to sustain his position at the Bar, and he retired after 10 years' practice.

During his legal career, Pakenham became something of a legend, and, 25 years on, accounts of his exploits are still current. During his appearance before an irascible and unpopular judge in a drugs case, the evidence, a bag of cannabis, was produced. The judge, considering himself an expert on the subject, said to Pakenham, with whom he had clashed during the case: "Come on, hand the exhibit up to me quickly." Then he proceeded to open the package. Inserting the contents in his mouth, he chewed it and announced: "Yes, yes of course that is cannabis. Where was the substance found, Mr Pakenham?" The reply came swiftly, if inaccurately: "In the defendant's anus, my Lord."

Pakenham's final appearance in court has been variously recorded. As defence counsel in a complicated fraud case, he was due to address the court during the afternoon session, and had partaken of a particularly well-oiled lunch. "Members of the jury," he began, "it is my duty as defence counsel to explain the facts of this case on my client's behalf; the Judge will guide you and advise you on the correct interpretation of the law and you will then consider your verdict. Unfortunately," Pakenham went on, "for reasons which I won't go into now, my grasp of the facts is not as it might be. The judge is nearing senility; his knowledge of the law is pathetically out of date, and will be of no use in assisting you to reach a verdict. While by the look of you, the possibility of you reaching a coherent verdict can be excluded." He was led from the court.

Joel Villaseñor *is an attorney at Sullivan Taketa LLP in Westlake Village, and a member of the CITATIONS editorial board.*

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BOOKS FOR SALE

(1) California Workers' Compensation Law, 6th Edition (Herlick). Publisher: Matthew Bender. Purchased recently for Pro Per W.C., planned to use the 2-volume loose-leaf with supplement, but did not use it. New: $226, will sell for $150. (2) California Workers' Compensation Handbook, 24th Edition (Herlick). Publisher: Matthew Bender. Not used. New: $108, will sell for $75. Call Lili at (805) 407-1808.

EXEC'S DOT…DOT…DOT…

By Steve Henderson, Executive Director

Carmen Ramirez was elected by her peers on July 14 to a three-year term on the State Bar's Board of Governors. She'll be sworn in at the bar's annual meeting September 8-11 in San Diego... **Dean Hazard** and his wife, Maddy, left London after a week for Wales and some hiking the day before the explosions occurred. They returned to the states from Heathrow the Saturday after. Dean explained that Heathrow looked no different leaving than when they arrived and getting out was not a problem... Deadline for submitting your nominee for the **Ben E. Nordman Public Service Award** is August 19. See the nomination form contained within the guts of this mag... The bar's Client Relations Manager from 1997-2004, **Charlene Saxey**, completed her first marathon finishing in 4:54 at the Rock 'N Roll Race in San Diego. She tells me 4:30 was doable, but suffered minor setbacks at the port-a-potties and the Tylenol station. Charlene is a Compliance Officer with Cardservice International and a member of the JHB Inn of Court... Looney Laws: Wisconsin law states that apple pie cannot be served or eaten anywhere in the state without a slice of cheese on top... In Cushing, Oklahoma, it is against the law to drink beer while attired only in underwear... From Will Rogers: "Make crime pay. Become a lawyer." License Plate of the Month: CME LAW on **Patricia Mann**'s Ford Explorer named Pearl. She's a family law attorney in Simi– get it?...

There's an entertaining read in the LA Daily Journal July 6, which profiles **Justice Art Gilbert.** Gilbert "has a penchant for penetrating prose." – Can be found at www.dailyjournal.com... In a San Diego Court: Commissioner Narry Powazek of family court was trying to set a date when both attorneys would be available. Tim McKinney pulled out his paper calendar. Jacques Pulio's calendar was a bit more technologically advanced and included a cell phone, which rang as soon as he pulled up his calendar. After he apologized, his phone rang a second time. The third time the cell phone rang, Commissioner Powazek said, "You know I've shot people for less than that." McKinney reflexively responded, "No objection, your honor."... From Samuel Goldwyn: "It is hard to say whether the doctors of law or of divinity have made the greater advances in the lucrative business of mystery."...

Congrats to **Meghan Clark** and **Melissa Sayer** on their promotion to partners at **Nordman Cormany Hair** and **Compton**. Clark, a past president of Barristers, works in the firm's Employment, Intellectual Property and Litigation law groups. Sayer is a member of the firm's Corporate & Business law group. NCH&C also hired a new associate – **Spring Robinson** comes to the firm with 10 years experience in Marin County... Old Chinese proverb: "It's better to enter the mouth of a tiger than a court of law."... From Foster M. Russell: "Every story has three sides. Yours, mine, and the facts."... James Henry Smith was a big time Pittsburgh Steelers fan in life – and even death. His family planned an unusual viewing at the funeral home in Pittsburgh. Smith's body was on a recliner, his feet crossed and a remote in his hand. He wore black-and-gold silk pajamas, slippers and a robe. A pack of cigarettes and a beer were at his side, while a TV played a continuous loop of Steeler highlights..

As of July 1, the Law Offices of **Thomas Beach** will be **Beach·Whitman, LLP**. They employ seven lawyers and remain on Paseo Camarillo in Camarillo... From the will of a citizen of Rome: I, Lucius Titus, have written this, my testament, without any lawyer, following my own natural reason rather than excessive and miserable diligence... Another Looney Law: In Massachusetts it is illegal to wear stilts while working on a construction site... License Plate of the Month Installment #2: HKK III on a silver Volvo and driven by **Harold Kyle**... From John Cage in Ally McBeal: "It's not my nature to engage in postcommentary, but since you're well traveled in legal circles, I'd appreciate you telling all your friends exactly what happened in here, you sneaky, arrogant, bad faith bastard."...

Bailing us out! **Michael McMahon**, Chief Deputy Public Defender, has agreed to jump in and accept the position as Chair of the Conference of Delegates. He's filling in for an ailing **Melissa Hill** on a temporary leave from her position as Research Attorney with the courts... If you want into the Jerome H. Berenson Inn of Court, better let me know now as we begin the 2005-2006 campaign in September... Real World Rules #8 by Bill Gates: Your school may have done away with winners and losers, but life has not. In some schools, they have abolished failing grades and they'll give you as many times as you want to get the right answer. This doesn't bear the slightest resemblance to anything in real life...

The law firm of **Arnold**, **Bleuel**, **LaRochelle**, **Mathews & Zirbel** honors everyone's birthday in style with impromptu "coronation" ceremonies in the staff lounge. The birthday folks are treated like royalty the remainder of the day too... According to the LA Times (July 6, 2005), of the 70 judges the Republican Governor has appointed since he took office, 37 have been Republicans, 25 have been Democrats, eight have been Independent or have declined to state their party affiliation. Of Schwarzenegger's appointees, 27% are woman, 2.9% are Latino, 1.4% are African American and 8.6% are Asian. San Diego County Superior Court Judge Francis Devaney said the whole process was "kind of mysterious." He described his interview with the Governor's Judicial Advisor, John Davis, as "John's way of finding out if I was a weirdo or a normal person." ...

Steve Henderson *has been the executive director of the bar association since November 1991 and is riding horses at a dude ranch in Jackson Hole the first week of the month. So don't bother calling, emailing, faxing or text messaging through the 12th. Additionally, his boss's birthday is the 27th, so give Donnie a call and wish him a happy 80th! Lastly, his wife's birthday is the 19th and he expects to be much poorer soon.*

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